

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

|                       |   |                    |
|-----------------------|---|--------------------|
| In re Application of  | ) | Appeal No. 95-0058 |
|                       | ) |                    |
| BENJAMIN R. PHILLIPS, | ) | DECISION           |
| Appellant             | ) |                    |
| _____                 | ) | September 28, 1999 |

STATEMENT OF THE CASE

Appellant Benjamin Phillips filed a timely appeal of an Initial Administrative Determination [IAD] that was issued on March 20, 1995, by the Restricted Access Management [RAM] program. The IAD denied Mr. Phillips's claim for halibut Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish. The ground for denial was that the applicant was not a qualified person for QS under IFQ regulation, 50 C.F.R. § 679.40(a)(2).<sup>1</sup> Mr. Phillips has shown that his interest is directly and adversely affected by the IAD, as required by 50 C.F.R. § 679.43(b).

ISSUES

1. Is Mr. Phillips a qualified person for QS under the IFQ regulations?
2. Did NMFS or the IFQ regulations unlawfully discriminate against Mr. Phillips on the basis of age?

DISCUSSION

Mr. Phillips was in high school during 1984-1987. In 1989, he purchased the F/V LIL PELICAN with the sole intent of fishing halibut in IFQ regulatory area 2C of the waters off Southeast Alaska. Mr. Phillips' insurance policy for the vessel prohibited him from using the vessel in that area. So, instead he fished in International Pacific Halibut Commission (IPHC) regulatory area 2A. In 1990, he used his vessel to make four landings of halibut that were harvested with fixed gear from that area. Mr. Phillips claims he could not get insurance coverage for IFQ regulatory area 2C because of his youth and inexperience. RAM denied Mr. Phillips's application for QS on the grounds that he was not a "qualified person" under the regulations of the IFQ program.

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<sup>1</sup>Formerly, 50 C.F.R. § 676.20(a)(1). The IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was not changed by the renumbering.

## 1. Is Mr. Phillips a qualified person for QS under the IFQ regulations?

To be considered a “qualified person” for halibut QS, a person must have owned or leased a vessel that made legal landings of halibut harvested with fixed gear from an IFQ regulatory area during a QS qualifying year, between 1988-1990.<sup>2</sup> The IFQ halibut regulatory areas for QS are 2C, 3A, 4A, 4B, 4C, 4D, and 4E.<sup>3</sup> RAM is required to calculate a qualified person’s halibut QS on the basis of legal halibut landings made from vessels owned or leased by the qualified person during the QS base years (1984-1990).

The evidence in the record shows that the only legal landings made by Mr. Phillips during the QS qualifying years were four halibut landings from the F/V LIL PELICAN in 1990.<sup>4</sup> The landings were harvested with fixed gear in IPHC regulatory area 2A,<sup>5</sup> a non-IFQ regulatory area. I conclude that Mr. Phillips is not a qualified person for QS because the halibut landings were not harvested in an IFQ regulatory area.

Mr. Phillips asks that an exception be made in his case because he asserts that he would have fished in IFQ regulatory area 2C<sup>6</sup> but for the insurance policy restrictions placed on the use of his vessel in that area because of his young age<sup>7</sup> and inexperience. The insurance policy restricted Mr. Phillips's vessel to fishing in IPHC regulatory area 2A within 25 miles of Cape Flattery, off Washington.

Unfortunately for Mr. Phillips, the IFQ regulations do not provide for exceptions to the requirements of qualifying for QS. The North Pacific Fishery Management Council expressly rejected allowing QS on

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<sup>2</sup> See, 50 C.F.R. § 679.40(a)(2)(A), which provides in relevant part: “ ... a ‘qualified person’ means a ‘person,’ ... That owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year; ...”

<sup>3</sup>See, 50 C.F.R. § 679.2

<sup>4</sup>See, State of Washington Department of Fisheries fishing records, which show Mr. Phillips made halibut landings on July 11, 1990, July 31, 1990, August 28, 1990, and September 12, 1990.

<sup>5</sup>IPHC regulatory area 2A includes all waters off the state of California, Oregon, and Washington. See, 50 C.F.R. § 301.6.

<sup>6</sup>Under the IPHC regulations (50 C.F.R. § 301.6), area 2C includes all waters off Alaska that are east of a line running 340 degrees true from Cape Spencer Light and south and east of a line running 205 degrees true from said Light.

<sup>7</sup>Mr. Phillips was 21 years of age at the time of his claimed landings in 1990. See, Mr. Phillip’s RFA, in which he lists his birth date as September 17, 1968.

the basis of hardship or unavoidable circumstance.<sup>8</sup> The Council determined that providing a three-year qualifying period and allowing applicants to select their best five years of fishing during the base years was sufficient to compensate applicants whose catch had been reduced as a result of circumstances beyond their control, and that no additional hardship provisions would be considered for the IFQ program.<sup>9</sup>

This Office has denied relief to a number of applicants seeking QS who claimed that they would have made qualifying landings but for circumstances beyond their control. We ruled in those appeals that neither RAM nor this Office has authority to allocate qualifying pounds that are not based on actual landings.<sup>10</sup> I reach the same conclusion in this appeal. Therefore, neither I nor RAM is authorized to grant an exception for Mr. Phillips in this case.

## **2. Did NMFS or the IFQ regulations unlawfully discriminate against Mr. Phillips on the basis of age?**

On their face, the IFQ regulations do not impose age requirements for the qualification of QS. Under the IFQ regulations,<sup>11</sup> any “qualified person” who is an individual citizen of the United States can be issued QS, regardless of age. Nor did RAM [NMFS] discriminate against Mr. Phillips on the basis of his age when it denied his application for QS. Mr. Phillips was denied QS, not because of his age (or limited experience), but because the fish he landed were not harvested in an area covered by the IFQ program.

Mr. Phillips, nevertheless, alleges that enforcement of the IFQ regulations in his case amounts to unlawful age discrimination. I disagree. Even if Mr. Phillips was in high school during a portion of the base years, and even if he could not obtain insurance coverage during the QS qualifying period because of his age, the federal age discrimination laws do not apply to Mr. Phillips in this instance, nor do they prevent RAM from enforcing its regulations.

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<sup>8</sup>The Council made the decision at its September 28-October 5, 1994 meeting.

<sup>9</sup>*See*, 57 Fed. Reg. 57,134 (1992).

<sup>10</sup>*See*, the following cases, in which Appellants argued that they would have had landings but for the EXXON VALDEZ spill in 1989: Kenneth M. Adams, Appeal No. 95-0004, March 22, 1995; William E. Crump, Appeal No. 95-0024, June 27, 1995; Jimmy D. Hutchens, Appeal No. 95-0094, June 28, 1995; and Michael C. Hatten, Appeal No. 95-0136, January 30, 1996. *See also*, Charles J. Petticrew, Appeal No. 95-0008, July 3, 1996, in which the Appellant argued that he would have made landings but for a physical disability; and Leonard Leach, Appeal No. 95-0115, May 6, 1998, in which Appellant argued that he would have made landings, but for the sinking of his fishing vessel.

<sup>11</sup>*See*, 50 C.F.R. § 679.40(a)(2)(i) and 50 C.F.R. § 679.2.

The law of age discrimination is found primarily in the employment setting, where it is aimed at prohibiting and redressing discrimination against older workers. For example, the federal Age Discrimination in Employment Act [29 U.S.C. §§ 621-634 (1994)] does not apply to discrimination against people under the age of 40. While young persons and minors are often subject to different treatment than older adults, such treatment is generally lawful where it is not arbitrary and reasonably furthers a legitimate state interest, such as when it is designed to protect the minor or others from harm. Examples include child labor laws and laws prescribing minimum ages for driving motor vehicles or for purchasing and consuming alcoholic beverages. See, e.g., Manuel v. Louisiana, 677 So.2d 116 (La. 1996).

This body of law has no application to Mr. Phillips or to the IFQ program. But even if it did, challenges to the legality of the IFQ regulations are not within the purview of this Office. An Appeals Officer has no authority to invalidate IFQ regulations and to order relief sought on the basis of an alleged conflict with other federal law.<sup>12</sup> Such broad authority lies with the courts, and Mr. Phillips's redress on a conflict with federal law must be sought in that forum.

Mr. Phillips has failed to demonstrate that either NMFS or the IFQ regulations have unlawfully discriminated against him on the basis of age. The alleged discrimination, if any, would have been by his vessel insurer, not NMFS. Thus, I find that Mr. Phillips's claim of age discrimination by NMFS is without merit.

#### FINDINGS OF FACT

1. Mr. Phillips made four landings of halibut harvested in IPHC regulatory area 2A.
2. IPHC regulatory area 2A is not an IFQ regulatory area for purposes of QS.
3. Mr. Phillips did not own or lease a vessel that made legal landings of halibut or sablefish harvested with fixed gear in an IFQ regulatory area during the QS qualifying period.

#### CONCLUSIONS OF LAW

1. QS can only be issued on the basis of actual, not hypothetical landings of halibut or sablefish.
2. Mr. Phillips is not a qualified person for QS, nor can he be issued QS to compensate him for circumstances beyond his control that may have prevented him from making qualifying landings.
3. The IFQ regulations do not discriminate on the basis of age.

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<sup>12</sup>See, George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995.

4. Mr. Phillips's application for QS was denied not because of his age or limited experience, but because his claimed landings were not harvested in an area covered by the IFQ program.
5. Application of the IFQ regulations in this case does not violate federal age discriminate laws.
6. An Appeals Officer does not have the authority to invalidate IFQ regulations and to order relief to an appellant on the basis of an alleged conflict between IFQ regulation and other federal law.

#### DISPOSITION

The IAD that is the subject of this appeal is **AFFIRMED** on the grounds stated in this Decision. This Decision takes effect on October 28, 1999, unless by that the Regional Administrator orders review of the decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m., Alaska Time, on October 8, 1999, the tenth day after the date of this Decision. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion.

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Randall J. Moen  
Appeals Officer